

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc.)	WC Docket No. 03-220
For Forbearance Under 47 U.S.C. § 160(c))	
From Application of Sections 251(c)(3),(4), and (6))	
In New-Build, Multi-Premises Developments)	

**OPPOSITION TO BELL SOUTH'S PETITION FOR FORBEARANCE
UNDER 47 U.S.C. 160(c) IN NEW-BUILD, MULTI-PREMISE DEVELOPMENTS**

Julia O. Strow
Vice President – Regulatory and
Industry Relations
Cbeyond Communications
320 Interstate North Parkway, SE
Suite 300
Atlanta, GA 30339

Andrew D. Lipman
Richard M. Rindler
Patrick J. Donovan
Harisha J. Bastiampillai
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel)
(202) 424-7643 (fax)

Counsel for Cbeyond Communications, Focal
Communications Corporation, McLeodUSA
Telecommunications Services, Inc., Mpower
Communications Corp., TDS Metrocom, LLC

Richard Metzger
Vice President & General Counsel
Focal Communications Corporation
7799 Leesburg Pike
850 North
Falls Church, VA 22043

William Haas
McLeodUSA Telecommunications Services,
Inc.
6400 C Street, S.W.
P. O. Box 3177
Cedar Rapids, IA 52406

Richard E. Heatter, Esq.
Vice President, Legal Affairs
Mpower Communications Corp.
175 Sully's Trail, Suite 300
Pittsford, NY 14534

Mark Jenn
Manager – CLEC Federal Affairs
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, WI 53717

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SUMMARY

Not satisfied with the significant unbundling exemptions the *Triennial Review Order* has already provided, BellSouth asks the Commission to forbear from unbundling requirements for new-build, multi-premise developments. BellSouth's proposed forbearance would encompass single-family homes, commercial and residential multi-unit premises, shopping malls, industrial parks, and any other developments where the telecommunications infrastructure would be "new construction." BellSouth, however, does limit its proposed unbundling exemption to "new construction" but includes any re-development of existing properties.

BellSouth's Petition must be rejected for numerous reasons. As a threshold matter, the Commission may not forbear from Section 251(c) unbundling requirements until the requirements have been "fully implemented." The Commission has made no such finding, and has given no indication that full implementation will occur in the foreseeable future. BellSouth argues that its region-wide Section 271 authorization demonstrates full implementation, but this argument is belied by the fact that BellSouth concedes that multi-premise development facilities would still be subject to Section 271 unbundling obligations. If its Section 271 authorization is not sufficient to support forbearance from Section 271 unbundling requirements, which it is not, then it is clearly insufficient to support forbearance from Section 251(c) requirements.

It is also ludicrous for BellSouth to suggest that Section 251(c) requirements have been fully implemented when the Commission recently found significant impairment for numerous network elements in its *Triennial Review Order*. The Commission explicitly found impairment for commercial and residential multi-unit premises which form a significant component of multi-premise developments. CLECs seeking to serve these developments would have to deploy high-capacity facilities and face the same economic and operational obstacles the Commission

identified in the *Triennial Review Order*. BellSouth does not even make any pretense of attempting to demonstrate that CLECs would not face impairment in regard to serving these communities. ILECs, meanwhile, can leverage their existing fiber deployment and access to rights-of-way to serve these communities at a lower cost than the CLECs. The fact that BellSouth has a significant lead in serving new developments in its region, and is described as the “market leader” for integrated community development, demonstrates the advantages that an ILEC possesses.

BellSouth’s Petition is also fatally overbroad and vague. It does not provide any clear limitations in regard to facilities affected. Thus, ILECs could use this “forbearance” to deny access to CLECs to a significant number of customers. Moreover, BellSouth attempts to extend a limited unbundling exemption of fiber loops to the home to encompass commercial and residential multi-unit buildings, shopping malls, and industrial parks, among others, without demonstrating any lack of impairment in regard to these facilities. The record certainly does not support such an extension of the unbundling exemption.

Finally, BellSouth also fails to show that the requirements of Section 10(a) have been met. The Commission has required for forbearance the demonstration of a significantly larger amount of competition than that which is present in the local exchange market. There are also no adequate safeguards that the rates customers in these developments will be paying will be just and reasonable. The stranglehold ILECs would possess over new and redeveloped communities would likely entail much higher prices and few choices for customers.

The Commission should unequivocally deny BellSouth’s unsupported and overbroad Petition.

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Cbeyond Communications, Focal Communications Corporation, McLeodUSA
Telecommunications Services, Inc., Mpower Communications Corp., and TDS Metrocom, LLC
(collectively "CLECs"), through undersigned counsel submit this opposition to BellSouth's
Petition for Forbearance Under 47 U.S.C. § 160(c) In New-Build, Multi-Premise Developments.

I. SECTION 10(D) MANDATES THE DENIAL OF BELL SOUTH'S PETITION

In its Petition, BellSouth seeks forbearance from applying sections 251(c)(3), (4) and (6)
to New-Build, Multi-Premise Developments. BellSouth defines as new-build, multi-premise
developments, "newly-constructed multi-subscriber premises" including single-family home
subdivisions, multiple-dwelling units, and multi-unit premises, including multi-tenant
commercial buildings, mixed use developments, malls, industrial parks, and other developments
where the improvements, including the telecommunications infrastructure, will be new
construction. BellSouth also includes re-developments of existing properties that are undergoing
total rehabilitation.

In order to forbear, the Commission, pursuant to the requirements of Section 10(a), must
determine that: i) "enforcement of such regulation or provision is not necessary to ensure that
the charges, practices, classifications, or regulations . . . are just and reasonable and are not

unjustly or unreasonably discriminatory;” ii) “enforcement of such regulation or provision is not necessary for the protection of consumers;” and iii) “forbearance from applying such provision or regulation is consistent with the public interest.”¹ In regard to the public interest consideration, the Commission must determine whether forbearance will promote competitive market conditions and enhance competition among providers of telecommunications service.² Since the proposed forbearance would involve requirements of Section 251, Section 10(d) requires that the Commission must also determine that the requirements of Section 251(c) have been “fully implemented.”³

A. The Requirements of Section 251 Have Not Been Fully Implemented

Section 10(d) clearly evidences a Congressional intent that forbearance in regard to Section 251(c) provisions should not be entered into lightly. As the Commission has noted, the “fully implemented” language of Section 10(d) demonstrates that Congress considered Section 251 to be a “cornerstone” of the 1996 Act.⁴ While the term “fully implemented” is not defined in the Act, it is hard to imagine that the drafters would consider the Act to be fully implemented seven years after the Act, with CLECs possessing only 13% of the local market. The Commission previously declined to forbear from Section 271 requirements in regard to advanced services finding that “Congress did not provide us with the statutory authority to forbear from these critical market-opening provisions of the Act until their requirements have

¹ 47 U.S.C. § 160(a).

² 47 U.S.C. § 160(b).

³ 47 U.S.C. § 160(d).

⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, ¶ 73 (1998).

been fully implemented.”⁵ The Commission explicitly noted that there is “no language in section 10 that carves out an exclusion from the prohibition for actions pursuant to section 706.”⁶

It is somewhat ironic then that while BellSouth claims the provisions of Section 251(c) have been fully implemented due to BellSouth’s obtaining Section 271 authorization in its region, BellSouth notes that MPD network elements would continue to be subject to the unbundling requirements of section 271. Thus, BellSouth correctly finds that its Section 271 authority is insufficient to allow the Commission to lift Section 271 unbundling obligations. The Section 271 authorization is likewise insufficient to lift Section 251(c) requirements. In addition, as the Commission noted in the *Triennial Review Order*, Section 271 access requirements are separate to Section 251 access requirements.⁷ Thus, obtaining Section 271 authority cannot equate to meeting the Section 251(c) forbearance requirements.

In addition, attainment of Section 271 authority does not end the obligation to unbundle network elements. The Senate debate accompanying the Act evidenced the view of the Act’s drafters that BOCs would have to “provide loops, transport, and switching for ‘the reasonably foreseeable future.’”⁸ The sponsor of the Senate Bill noted that the checklist included:

[t]hose things that a telecommunications carrier would need from a Bell operating company in order to provide a service such as telephone exchange service or exchange access service in competition with the Bell operating company. The competitive checklist could best be described as a snapshot of what is required for these competitive services now and in the reasonably foreseeable future.⁹

⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 11 (1998).

⁶ *Advanced Services Order*, ¶ 72.

⁷ *Order*, ¶ 654.

⁸ CC Docket No. 01-338, Reply Comments of Z-Tel Communications, Inc. at 111 (July 17, 2002) (“*Z-Tel Reply Comments*”), citing, 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

⁹ *Id.*

This language conveys the notion that “reasonably foreseeable future” would include post-271 authority activity. One Senator noted that benefits from the Act may take years to materialize based on the amount of time it took the benefits of competition to materialize in the long distance market after divestiture.¹⁰ In fact, the Act’s language expressly contemplates that checklist obligations remain in place even after the Commission has deemed a market opened to competition under Section 271. Section 271(d)(6) gives the Commission authority to take certain actions if the RBOC fails to meet any of the conditions required for approval, including suspension or revocation of such approval.¹¹

B. The Commission’s Recent Findings of Impairment Unequivocally Demonstrate that Section 251(c) Has Not Been Fully Implemented

It is ludicrous given the fact that the Commission has just renewed unbundling obligations pursuant to Section 251(c) that BellSouth would assert that the requirements of Section 251(c) have been fully implemented. In fact, the Commission has explicitly found impairment for many of the very facilities for which BellSouth seeks forbearance. In particular, BellSouth’s forbearance petition would encompass both residential and multiunit premises despite the Commission finding impairment in regard to facilities serving these premises. As the Commission noted:

When customers typically associated with the mass market reside in multiunit premises, carriers seeking to self-deploy their own facilities to serve these customers face the same barriers as when serving multiunit premise-based enterprise customers. Because we find that the barriers faced by requesting carriers in accessing customers in multiunit premises are not unique to enterprise market customers residing in such premises but extend to all classes of customers residing therein, including residential or other mass market tenants, the conclusions we reach for high-capacity loops in the enterprise market apply equally to mass market customers in multiunit premises.¹²

¹⁰ *Id.*, citing, 141 Cong. Rec. S7,909 (daily ed. June 7, 1995).

¹¹ 47 U.S.C. § 271(d)(6)(A).

¹² *Order*, ¶ 197, n. 624.

Later in the *Order*, the Commission once again reiterated that “competitive LECs serving customers residing in multiunit premises typically associated with the mass market face the same economic and operational barriers as serving customers residing in multiunit premises typically associated with the enterprise market.” *Order*, ¶ 347, n. 1040.

CLECs seeking to serve MPDs must deploy high-capacity facilities to the multiunit commercial and residential buildings in the development to be able to serve multiple customers. Unless the CLEC obtains significant amounts of customers in these premises it will not begin to approach the economies of scale that ILECs possess in regard to serving these buildings. In particular, small and medium enterprise customers provide much lower revenue opportunities than large enterprise customers and have a greater potential to change carriers.¹³ Moreover, if the CLEC ultimately loses the customer(s) in the building the costs are sunk. For instance, it costs MCI on average \$250,000 to add a building to its network, and that is if the building is within a mile of its network. If not, the building will only be added as part of the construction of a new ring, which is a multimillion dollar project.¹⁴ Thus, it will only consider adding a building if demand in that building is greater than a DS-3 which is very rare.¹⁵

Even if the demand is sufficient at the location to support self-deployment of facilities from a cost recovery perspective, as the Commission noted, there are other obstacles that must be overcome before self-deployment can effectively occur. These obstacles include the inability to obtain reasonable and timely access to the customer’s premises both in deploying the fiber to the location and “getting in” into the building, and convincing the customers to accept the delays and

¹³ *Order*, ¶ 325.

¹⁴ CC Docket No. 01-338, WorldCom Comments at 19.

¹⁵ CC Docket No. 01-338, WorldCom Comments at 19.

uncertainty associated with the deployment of alternative loop facilities.¹⁶ In regard to accessing the building, a CLEC must secure rights-of-way access (which often entail lengthy negotiations), obtain building and zoning permits, and overcome construction moratoriums.¹⁷ Due to these obstacles, the Commission determined it is not economically feasible to deploy to many enterprise market customer locations, particularly less densely populated areas.¹⁸ The Commission noted that in most areas, the CLEC is unable to self-deploy and have no alternative to the ILEC's facility.¹⁹

Thus, even if one agrees with the Commission's conclusion in the *Triennial Review Order* that CLECs are not impaired in regard to serving single family residences in new communities, Section 251(c) clearly has not been "fully implemented" in regard to other MPD facilities such as multiunit developments. This fact, without more, is sufficient to dismiss this Petition.

Even assuming *arguendo* that Section 10(d) would not pose a fundamental obstacle to BellSouth's Petition, the flawed nature of BellSouth's fundamental premise is a further basis for rejection of this Petition. BellSouth somehow suggests that a CLEC stands in the same position as BellSouth in regard to deploying facilities to new communities.

ILECs, even in regard to new developments, will possess inherent advantages in serving these areas. Unlike CLECs who will have to deploy new fiber facilities, ILECs may already have dark fiber that they can utilize.²⁰ Even if they do not they will already possess rights-of-way access throughout the service area, and relationships with municipalities and other utilities,

¹⁶ Order, ¶ 303.

¹⁷ Order, ¶ 305.

¹⁸ Order, ¶ 313.

¹⁹ Order, ¶ 314.

²⁰ Order, ¶ 313.

such that they can more easily access the new community. In addition, an ILEC has existing SONET network deployment such that accessing new communities will be much easier than for the CLEC.²¹ All these factors give ILECs a significant advantage in serving new communities. The ability to leverage existing network deployment and relationships with other utilities with whom the ILEC will likely have existing arrangements for joint trenching into new developments cannot be understated. For instance, the evidence of limited CLEC greenfield deployment in regard to new developments primarily consisted of CLEC affiliates of ILECs utilizing an edge-out strategy where they can tap into their existing ILEC network.²² Moreover, since the community will be exclusively marketing a telephone company the likely emphasis will be on selecting a carrier with which the majority of potential residents will be most comfortable. The ILEC will possess a significant advantage in this regard as well. Its long history in the area will give it all the effects of a first mover advantage even in regard to new communities.

BellSouth proffers some figures to support its proposition that CLECs may be in a comparable position with BellSouth in regard to new developments. These figures prove nothing, however, and may actually lend further support to denying this Petition. BellSouth contends that there will be 490,000 new housing starts in its region during 2003. Under separate cover, BellSouth noted that 315,000 new homes will be deployed in its territory this year, and that it would be serving nearly half of them (135,000 with FTTC loops).²³ Thus, while BellSouth does not specify how many of the new homes for which it will be providing service, the odds are very high that it will be providing service for the vast majority of new homes in its region which it will develop in joint concert with other monopoly utilities such as the gas, water

²¹ See *UNE Remand Order*, ¶ 324.

²² See RBOC UNE Fact Report at IV-16.

²³ CC Docket No. 01-338, September 29, 2003 BellSouth *Ex Parte* Presentation at 10 (Sept. 30, 2003).

and electric providers at a reduced cost through joint trenching. For instance, one developer described BellSouth as the “market leader” for this type of integrated community development.²⁴ Essentially BellSouth is asking the Commission to etch this advantage in stone.

II. BELLSOUTH’S PETITION IS VAGUE AND OVERBROAD

BellSouth’s claims it is only seeking limited forbearance, but defines as new-build, multi-premise developments, “newly-constructed multi-subscriber premises” including single-family home subdivisions, multiple-dwelling units, and multi-unit premises, including multi-tenant commercial buildings, mixed use developments, malls, industrial parks, and other developments where the improvements, including the telecommunications infrastructure, will be new construction. BellSouth also includes re-developments of existing properties that are undergoing total rehabilitation. Thus, all an ILEC would have to do is deploy new fiber in a community and exempt all properties within that community from unbundling requirements save for single-tenant commercial buildings.

BellSouth is attempting to stretch a discrete exception that the Commission created for fiber-to-the-home loops and extend it to both new and redeveloped communities *en toto*. BellSouth proffers no empirical basis for this extension of the rule, and no basis to overlook the specific impairment that the Commission found in regard to both residential and commercial multiunit premises. The studies provided by Corning and entities such as the FTTH Council focused on revenues from FTTH loops to residential single unit premises. No analysis was conducted in regard to other components of new developments such as multiunit premises, yet, BellSouth asks the Commission to exempt these facilities as well.

²⁴ BellSouth Now Wiring New Homes for the Future, BellSouth Press Release (June 15, 2000).

In addition, BellSouth's proposed exemption further blurs the already tenuous distinction between greenfield and brownfield deployment. Since BellSouth would extend unbundling exemptions to redeveloped communities, the exception would swallow the rule. ILECs who are already able to leverage their existing fiber deployment and wire center locations for new fiber deployment in new communities would most certainly be able to utilize their existing network to rewire existing communities. The ILECs would possess existing dark fiber and rights-of-way access such that this rewiring would be easily facilitated. In addition, rewiring of existing communities is conceivably already within the scope of an ILEC's existing deployment plans and maintenance requirements such that this exemption from unbundling would not be needed to facilitate this deployment. Finally, it would be impossible to discern which fiber deployment is new in these rewired communities.

III. BELLSOUTH'S PETITION DOES NOT MEET THE REQUIREMENTS OF SECTION 10(A).

In applying its forbearance power under Section 10(a), the Commission has heretofore required the development of a much more significant amount of competition than that which the local exchange market currently exhibits. For instance, in determining whether to forbear from the requirements of Sections 201 and 202 of the Act for broadband PCS providers, the Commission clearly suggested that duopoly market power would not be sufficient to support forbearance.²⁵ The Commission noted that even though the CMRS market was progressing from duopoly market power, it was still not enough for forbearance. The Commission found that:

²⁵ *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, GN Docket No. 94-33, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 21 (1998) ("Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source.")

Nonetheless, the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring. The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched. These price declines, however, have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. . . . Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.²⁶

The Commission found “that current market conditions alone will not adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices” and, therefore, concluded that the first prong of the Section 10 forbearance standard had not been satisfied.²⁷

In the local exchange market, competitive market conditions are much less developed than the CMRS market. In the residential and small business mass market, even taking RBOC statistics at face value, there remains monopoly market power.²⁸ The price discipline the Commission seeks in evaluating forbearance is not present. A striking example is the special access market where RBOCs continue to charge far above the forward-looking cost of the facilities and have been raising prices where they have obtained pricing flexibility instead of lowering them.²⁹ Moreover, unlike the CMRS market, consumers do not have the opportunity to choose from several providers. Over one-third of the zip codes in the U.S. still do not have a competitive provider of local service.³⁰ Thus, the local market still has an enormous way to go in regard to competition before the Commission should even begin to consider forbearance.

²⁶ *Id.* at ¶ 22.

²⁷ *Id.* at ¶ 24.

²⁸ *See Z-Tel Reply Comments* at 42.

²⁹ CC Docket No. 01-338, Reply Comments of The Association of Local Telecommunications Services, *et al.*, at 65 (July 17, 2002).

³⁰ *Federal Communications Commission Releases Data on Local Telephone Competition*, FCC Press Release at 2 (July 23, 2002).

In addition, BellSouth cites to the continuing unbundling obligations in regard to MPD pursuant to Section 271 as an “additional guarantee” that if the ILEC successfully negotiates the installation of facilities in MPDs that its rates will be just, reasonable and nondiscriminatory. In its Petition for Reconsideration of the *Triennial Review Order*, however, BellSouth is seeking the removal of unbundling obligations pursuant to Section 271.

Enforcement of unbundling obligations is also necessary for the protection of consumers. BellSouth’s Petition creates a scenario whereby an ILEC could lock up a community into a long-term contract by leveraging its control over bottleneck facilities. The Commission, as noted above, has found a national level of impairment in regard to facilities serving both residential and commercial multiunit premises. Thus, even assuming *arguendo*, that CLECs are in a similar position in regard to their ability to deploy FTTH loops to single unit residences, the ILEC can leverage its advantages in regard to multiunit premises to be able to serve the entire community at a lower cost. The ILEC can therefore lock in the community to a long term contract. The fact that CLECs would be precluded from even reselling these services under BellSouth’s petition would further tighten BellSouth’s grip on the community. A CLEC would not be able to make any competitive inroad into the community. These communities, and the consumers located in the communities, would likely never enjoy the benefits of competitive service.

For the same reason, the proposed forbearance would not be in the public interest. BellSouth contends that all carriers would have greater incentive to participate in bidding process for these communities. This competition would be illusory, however, given the impairment CLECs face in regard to multiunit premises. Once again, the ILEC will be able to leverage this advantage to offer a more attractive package to the community. The ultimate result will be

higher prices and less competitive service offerings given the ILEC monopoly control over the community.

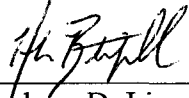
IV. CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's Petition for Forbearance.

Julia O. Strow
Vice President – Regulatory and
Industry Relations
Cbeyond Communications
320 Interstate North Parkway, SE
Suite 300
Atlanta, GA 30339

Richard Metzger
Vice President & General Counsel
Focal Communications Corporation
7799 Leesburg Pike
850 North
Falls Church, VA 22043

Respectfully submitted,



Andrew D. Lipman
Richard M. Rindler
Patrick J. Donovan
Harisha J. Bastiampillai
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel)
(202) 424-7643 (fax)

Counsel for Cbeyond Communications, Focal
Communications Corporation, McLeodUSA
Telecommunications, Inc., Mpower
Communications Corp., TDS Metrocom, LLC

William Haas
McLeodUSA Telecommunications Services,
Inc.
6400 C Street, S.W.
P. O. Box 3177
Cedar Rapids, IA 52406

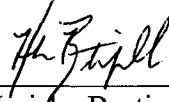
Richard E. Heatter, Esq.
Vice President, Legal Affairs
Mpower Communications Corp.
175 Sully's Trail, Suite 300
Pittsford, NY 14534

Mark Jenn
Manager – CLEC Federal Affairs
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, WI 53717

November 10, 2003

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on November 10, 2003, I caused to be served upon the following individuals the Opposition to BellSouth's Petition for Forbearance Under 47 U.S.C. § 160(c) in New-Build, Multi-Premise Developments in WC Docket No. 03-220.



Harisha Bastiampillai

Via ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Via Overnight Delivery:

Jonathan B. Banks
L. Barbee Ponder IV
BellSouth Telecommunications, Inc.
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036

Via Electronic Mail

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554
Qualexint@aol.com